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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 671

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Petitioners,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

No. 678

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

No. 756

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR CALLERY PROPERTIES, INC., IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (U.G.I. Pet., pp. 9a-37a)[1] is reported at 335 F. 2d 1004.

JURISDICTION

The judgment of the court of appeals reversing the orders of the Federal Power Commission and remanding the proceedings was entered on August 14, 1964 (U.G.I. Pet., pp. 38a-40a). Petitioners would invoke the jurisdiction of the Court to review the judgment below under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that, while the Commission need not convert a producer certificate hearing under Section 7(e) of the Natural Gas Act into a full-blown rate case, the Commission is under a duty to hear and evaluate all relevant evidence bearing on the public convenience and necessity when it is urged, or held, that a producer's proposed price is out of line.

2. Whether the court of appeals was correct in holding that the Commission may not properly condition the grant of a permanent certificate under Section 7 of the Natural Gas Act upon a requirement that the applicant thereafter waive the rate filing pro-

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[1] "U.G.I. Pet." refers to the petition for a writ of certiorari filed by The United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company in No. 671. As hereinafter used, "P.S.C. Pet." and "F.P.C. Pet." refer to the companion petitions filed by the Public Service Commission of New York and the Federal Power Commission in Nos. 678 and 756.

cedures reserved to natural gas companies under Section 4 of the Act.

3. Whether, having held that the Commission had the power to reduce rates retroactively and to order refunds in the unique circumstances of the instant case, the court of appeals was correct in further holding (a) that the producers were entitled to just and reasonable rates under the Natural Gas Act, and (b) that a balancing of the equities required that refunds not be ordered pending a determination of the justness and reasonableness of the contract rates collected by the producers over a period of years under unconditioned permanent certificates.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act (Sections 4, 5, 7 and 19(b), 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w) appear in Appendix A to the petition in No. 671 (U.G.I. Pet., pp. 1a-8a). The provisions of Sections 19(a) and (c) of the Act, as amended, are set forth in the Appendix, *infra*, p. 17.

STATEMENT

Respondent Callery Properties, Inc., is a nominee corporation engaged in the business of selling natural gas and oil produced from various fields in the States of Louisiana and Texas.[2] Since a substantial portion of the gas which it sells as agent for others is resold by pipelines in interstate commerce, Callery is subject to

[2] Callery is one of three related entities engaged in the business of exploring for and developing oil and gas reserves on behalf of individual investor-participants. As nominee and agent for approximately 300 individuals, estates, trusts and corporations for whom it holds record title in producing properties, Callery owns none of the gas which it sells (R. 326-27). It is unique among the other producer respondents in this respect.

regulation by the Federal Power Commission as a "natural-gas company" under the Natural Gas Act.

The case below began for Callery in December 1958 when it filed two applications with the Commission for certificate authority under Section 7 of the Act covering proposed sales of gas to Hope Natural Gas Company from fields in Acadia and Iberia Parishes, Louisiana. The proposed initial price in each case was 21.5 cents per Mcf, plus 2.05 cents per Mcf tax reimbursement. A hearing was held on Callery's applications in conjunction with related pipeline and producer applications, and on August 10, 1959 the Commission issued its Opinion No. 327, 22 F.P.C. 378 (R. 116), granting Callery and other producers proposing sales to Hope permanent unconditioned certificates of public convenience and necessity in accordance with their applications.

The Public Service Commission of New York sought rehearing of Opinion No. 327 and later judicial review on the ground that Callery and the other producers had failed to demonstrate why their sales were required by the public convenience and necessity at prices higher than the 18-cent price "line" contemplated by this Court in *Catco*[3] (R. 144).[4] Basing its decision on *Catco,* the Court of Appeals for the District of Columbia reversed Opinion No. 327 and remanded the

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[3] *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959).

[4] While urging that the certificates of the producers be conditioned at a price no higher than that demonstrated by the record to be in the public convenience and necessity, the New York Commission did not seek a stay of the certificate authority granted as it might have done under Section 19(c) of the Act. Being under a dual obligation to the pipeline purchaser and to royalty owners to commence production at the earliest date, Callery began deliveries of gas to Hope in December 1959.

case to the Commission for further proceedings in which the producer applicants might, if they so chose, "either augment the record so as to support a certification without price condition, or seek a certification appropriately conditioned." *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146, 150 (D.C. Cir. 1961).

On May 10, 1961 the Commission moved to carry out the judgment of the D.C. Circuit by consolidating the remanded proceedings involving Callery's sales with the area rate proceeding instituted on that date in Docket No. AR61-2 "to determine the rate, or rates, at which the public convenience and necessity requires, and a just and reasonable rate, or rates, for sales of natural gas" in the geographical area defined as Southern Louisiana, 25 F.P.C. 942, 944. Eight months later, without a hearing having been held in either the Southern Louisiana area proceeding or in Callery's remanded dockets, the Commission issued an order on January 10, 1962 advising Callery for the first time that the Commisison might subsequently require as a condition of amended certificate authorization that Callery refund revenues received from Hope Natural Gas Company from the date of first delivery of gas (R. 395).[5] Thereafter, on March 7, 1962, Callery's two

[5] Under its agency agreement with the owners of the gas which it sells, Callery is legally bound to distribute all income when received and may not withhold income from a current owner save in those instances where it has received prior notice of a potential refund liability. Since the ownership in the properties involved had changed radically in the period following the commencement of deliveries of gas to Hope and many of the original owners and recipients of income were no longer available, Callery sought review of the Commission's January 10, 1962 order. Its petition for review was dismissed by the Fifth Circuit without prejudice. *Callery Properties, Inc.* v. *Federal Power Commission*, 5th Cir. No. 19563 (September 20, 1963).

dockets were severed from the Southern Louisiana proceeding and consolidated with other remanded dockets for separate hearing and disposition, 27 F.P.C. 482 (R. 409).

In the hearing that followed, which lasted a total of four days and in the course of which virtually all evidence offered by Callery and the other producers in support of their initial contract prices was excluded as irrelevant, the presiding examiner ruled that the sole criterion for determining the initial price at which the producers' sales would serve the public convenience and necessity was the general price level prevailing in Southern Louisiana in 1957 and 1958 under contracts free from the infirmities which led the courts to reverse the Commission's original unconditional certifications. On December 7, 1962 the examiner issued a decision in which he determined the "in line" price for gas sold in Southern Louisiana under 1957 and 1958 contracts to be 20.0 cents per Mcf, including tax reimbursement of 1.5 cents per Mcf, and ordered Callery and the other producers to refund to their respective purchasers all amounts collected in excess of a base price of 18.5 cents from the date of initial delivery of gas (R. 490).

On July 17, 1963, by Opinion No. 398 and order issued in *Placid Oil Company, et al.*, 30 F.P.C. 283 (R. 549), the Commission affirmed the examiner's decision in all material respects. The examiner's conclusion that economic and cost evidence were irrelevant to the determination of a proper "in line" price was affirmed in particular, as was his finding that the producers be required to refund amounts previously collected under unconditioned permanent certificates. In addition to the other requirements of the examiner's

order, which the producers were given no option to reject, the Commission added a further condition imposing a moratorium on all rate increase filings in excess of 23.55 cents per Mcf, including tax reimbursement, until July 1, 1967, or the final decision in the Southern Louisiana area rate proceeding, whichever is earlier (R. 582).

On review of Opinion No. 398, the court below held that the Commission erred in three respects. The court found first that the Commission had failed in its statutory duty to determine the present and future public convenience and necessity when it restricted the scope of its inquiry in the remanded proceedings to pre-existing prices in Southern Louisiana. While agreeing that the question of whether a producer's proposed price is in line or not is an important and sometimes decisive factor in the certification of his sale, the court held that factors other than price exist which must be taken into consideration and that when, as in this case, it is urged and held that the proposed price is out of line, the Commission is under a duty to hear and evaluate all relevant evidence bearing on the public convenience and necessity.

Secondly, the court held that the moratorium on rate filings, imposed as a condition of permanent certificate authorization, was unlawful and tantamount to the Commission's repeal of a right reserved to natural gas companies by Congress under Section 4(d) of the Act. Finally, while upholding in the unique circumstances of the case the Commisison's power to require refunds, the court held that refunds should not be ordered pending a determination of the justness and reasonableness of the producers' rates under Sections 4 and 5 of the Act.

ARGUMENT

Petitioners assert in terms of important issues warranting review three grounds for the issuance of a writ of certiorari: (1) that the decision of the court below is in conflict with the decision of the D. C. Circuit in *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242 (*"Skelly"*), and decisions of other circuits which have held that the Commission may rely exclusively on an 'in line" determination in fixing the initial price at which it will authorize sales by producers; (2) that the court below ruled incorrectly on an important question left open by the Court in *Federal Power Commission* v. *Hunt*, 376 U.S. 515, namely, the power of the Commission to prohibit rate increase filings under Section 4(d) of the Act as a condition of permanent certification under Section 7 of the Act; and (3) that the court below misconceived the distinction between an "in line" price and a just and reasonable rate when it deferred the ordering of refunds in this case pending a determination of the justness and reasonableness of the producers' rates in an appropriate proceeding.

None of the grounds asserted by Petitioners warrants the granting of certiorari. The supposed conflict with *Skelly* is more apparent than real and, despite the efforts of Petitioners to create one, there is no substantial issue relating to the Commisison's conditioning power or the scope of its authority under the Natural Gas Act which has not already been determined by this Court or which was not correctly decided by the court below.

1. *The Exclusion of Evidence.* The first issue raised by Petitioners is succinctly stated by the Commission

(F.P.C. Pet., p. 7) to be whether the Commission may rely solely on an "in line" determination in fixing the initial price at which it will permanently certificate a producer's sale, or whether it is obliged to receive and consider a voluminous body of cost and other economic evidence offered by the applicant in support of an out-of-line price. The decision of the court below, holding that in this case the Commission was required to hear and evaluate evidence of other than a strictly "in line" type, is alleged to be squarely in conflict with the decision of the D.C. Circuit in the *Skelly* case, *supra*. The further contention is made that the court's ruling, if permitted to stand, will seriously impair the Commission's efforts to bring producers under effective regulation.

When the two cases are viewed in proper perspective and context, the claimed conflict between the decision below and the D.C. Circuit's decision in *Skelly* plainly does not exist. Unlike *Skelly* and the other cases relied upon by Petitioners (P.S.C. Pet., pp. 12-14), which involved initial certifications, the case below was unique in that it involved the residuum and by-product of a large number of earlier permanent certifications which had been remanded to the Commission in the light of *Catco, supra,* for the failure of the producers to show the "reason why" their sales were required by the public convenience and necessity at prices which would otherwise be considered out of line. By the time the Commission issued its decision in the remanded proceedings on July 17, 1963, most of the producers' sales were ancient history in the sense that known changes in the national economy had occurred in the period following their initial certifica-

tion.[6] Under the circumstances, consistent with its duty under Section 7(e) of the Act to determine the "present or future" and not the past public convenience and necessity, the Commission was required on remand to re-examine and evaluate all aspects of the producers' sales, including the initial price issue, in light of current conditions in the industry. *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817, 823 (9th Cir. 1960).

The Fifth Circuit's ruling that it do so in this case and that it not limit its inquiry solely to the "in line" price in prior years was nowise inconsistent or in conflict with the D.C. Circuit's endorsement of the Commission's "in line" determination in *Skelly* where, as the Commission itself acknowledges (F.P.C. Pet., p. 10), the evidence proffered and rejected was of a much more limited nature. Moreover, while holding in *Skelly* that consideration of the proffered evidence was not essential to the Commission's decision in that case, the court was careful to point out that:

> "* * * In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under *Catco*." (329 F. 2d at 247).

Bearing in mind that it was the Commission's failure to carry out its obligations under *Catco* that prompted the same panel of the D.C. Circuit to reverse and remand Opinion No. 327 for further proceedings to per-

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[6] This fact alone would explain why the Commission chose initially to consolidate Respondents' remanded proceedings with the Southern Louisiana area rate proceeding in Docket No. AR61-2. Nothing in the Fifth Circuit's decision would preclude the Commission from following that course today.

mit the producers either to "augment the record" or to seek "appropriately conditioned" certificates (287 F. 2d 146, 150), it is illogical to assume that any real conflict exists between the court's subsequent decision in *Skelly* and the holding below. In remanding Opinion No. 327 to the Commission with instructions to "augment the record," the D.C. Circuit obviously contemplated a hearing in which the producers would be afforded the opportunity of showing by substantial evidence the "reason why" their sales were required at the prices proposed in their contracts. Such a showing was obviously impossible when the Commission summarily excluded as irrelevant all evidence other than that relating to previously certificated prices in Southern Louisiana.

Petitioners all express the fear that the holding below will hereafter turn every producer certificate case under Section 7 into a "full blown rate case." They unanimously predict that, if allowed to stand, the Fifth Circuit's decision will open the floodgates overnight to a veritable deluge of cost and economic data more appropriate to a rate proceeding under Section 4 or 5 of the Act, thereby seriously impairing the Commission's current program for achieving effective producer regulation. Petitioners' fears in this regard are somewhat exaggerated.

In the first place, the vast majority of new gas sales contracts being entered into today are not only in the form prescribed by the Commission's rules but at the prices prescribed for the particular producing area shown in the Commission's Statement of General Policy No. 61-1, 18 C.F.R. § 2.56. Under streamlined certificating procedures now in effect, literally hundreds of new sales have been and are now being per-

manently certificated at the Policy Statement "guideline" prices in record time.[7] In those few cases where the proposed initial price exceeds the Commission's guideline price, or where its urged by an intervenor that the initial price is out of line, the producer may request temporary authorization or accept permanent certification at a lower price. It follows necessarily that in the present climate of producer regulation the number of cases in which the Commission would be required to hear and evaluate evidence proffered by the applicant in support of an out-of-line price would be relatively few.

Beyond that, and more important, the court below did not purport to indicate either the quantum or the nature of the proof required to sustain the certification of a sale at a higher than "in line" or out-of-line initial price. While indicating that the economic and cost evidence excluded by the Commission was clearly relevant in that it bore on broad questions of public convenience and necessity, the court recognized the administrative burden involved and the necessity for expedition in the discharge of the Commission's duties and responsibilities under the Act. The court therefore pointed to a specific, workable solution, which Petitioners have chosen to ignore, *i.e.*, that the Commission avoid the delays which would necessarily attend the trial of a full-dress rate case in a Section 7 certificate case by announcing the types of evidence deemed relevant and the nature of the proof required to support

[7] On February 26, 1964, the Commission announced that during the first 6½ months of experience under its new streamlined procedure for handling independent producer certificate cases it disposed of 806 filings in an average time of 42.3 days for each item, compared with approximately 100 days under the old process. See FPC Press Release No. 13156, issued February 26, 1964.

certification at an initial price deemed or urged to be out of line (U.G.I. Pet., pp. 24a-26a, n31).

Despite the assurance given producers by the Commission in its Statement of General Policy No. 61-1 that: "[w]here a proposed price exceeds the indicated rate level and is therefore conditioned . . . we will, in determining whether the higher price is justified, not necessarily consider only the financial requirements of the individual producer proposing the price but will consider all of the above elements relevant to the industry generally in the area concerned,"[8] the Commission has to date applied no standard other than historical price structure, or the "in line" price concept, where the producer's proposed price is alleged to be out of line. The Commission's final decision in the several area rate proceedings cannot be expected to provide a panacea for the recurrent problem facing the Commission in determining the initial price at which new gas is required by the present and future public convenience and necessity since, as is now the case in Docket No. AR61-2 where just and reasonable rates for the Southern Louisiana area are being determined on 1960 data, the final determination will always be outmoded by the time it is made. It is therefore vital, as the court below held, that the Commission receive and consider all relevant evidence bearing on the public convenience and necessity when it is urged or held that the proposed price is out of line and that the Commission not limit

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[8] The "above elements relevant to the industry generally" were stated to be "cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demand, and the available markets for the gas." (18 C.F.R. § 2.56).

its whole inquiry and determination to a price line having no current relevance.

2. *The Moratorium Issue.* In its decision in *Federal Power Commission* v. *Hunt,* 376 U.S. 515, decided last Term, the Court held that:

> "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue the rate filing procedure of that section." (376 U.S. at 523).

While it is true, as Petitioners point out, that the Court did not have before it, and specifically left open, the question of the extent of the Commission's power to condition a permanent certificate of public convenience and necessity (as opposed to temporary authorization) upon the applicant's agreement to waive the right to file for increased rates under Section 4(d) of the Act, we believe the court below was correct in holding that all rights granted and reserved to natural gas companies by Congress under the Act become fully operative at the time of permanent certification.

Were it otherwise, there would be little reason for the Commission to carry its regulation of producers beyond the point of permanent certification since, based on a finding of public convenience and necessity under Section 7(e) of the Act, the Commission could, without more, effectively require that a producer sell his gas at one fixed price and one price only over the entire life of the dedicated reserve, *i.e.,* declare a permanent moratorium at the time of permanent certification.

3. *The Refund Issue.* Based largely on the Court's decision in *Federal Power Commission* v. *Tennessee*

Gas Transmission Co., 371 U.S. 145, and the D.C. Circuit's decision in the *Skelly* case, *supra*, Petitioners contend that the court below, while correctly holding that Callery and the other producers should be required to refund all excess amounts collected under their original certificates, nevertheless erred in misconstruing Sections 7 and 4 of the Act when it held that the producers were entitled to just and reasonable rates under the Natural Gas Act and that the refunds should be deferred pending the outcome of an appropriate proceeding under the rate sections of the Act. There is no merit to Petitioners' contention on this point and little weight to their arguments.

In *Tennessee, supra*, refunds were ordered only *after* a determination under Section 4(e) that the increased rates involved were unjust and unreasonable and, while the Court noted that refunds did not constitute a perfect remedy, it did not suggest that refunds were inappropriate. Nor were refunds ordered in *Skelly*, the court finding in that case that the existence of the power to order restitution did not mean that its exercise was mandatory. In *Skelly*, the court remanded on a finding that "further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates." (329 F. 2d at 250). Noting that the producers in this case had sold their gas under unconditioned permanent certificates over a period of years and, further, that the Act requires that all rates "shall be just and reasonable" both to consumers and to natural gas companies, the court below held that a balancing of the equities required a deferral of refunds pending a determination of justness and reasonableness. Callery believes the court below was eminently correct in so holding.

While Callery did not and does not agree with the decision below insofar as it holds that the Commission may order retroactive refunds as a matter of law, Callery is willing to abide a proper determination of the justness and reasonableness of its contract rates in accordance with the court's decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for certiorari should be denied on all points and issues raised by Petitioners.

Respectfully submitted,

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January 11, 1965

APPENDIX

Rehearing; Court Review of Orders

SEC. 19(a) Any person, State municipality, or State commission aggrieved by the order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

* * * * *

SEC. 19(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U. S. C. § 717r]